

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 12**

CARMAX AUTO SUPER STORES, INC.

Employer

and

Case 12-RC-9029

**UNITED FOOD AND COMMERCIAL WORKERS
UNION, LOCAL 1625**

Petitioner

REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION

CarMax Auto Super Stores, Inc. (Employer) is a used car dealership with a facility at Boynton Beach, Florida, that buys, sells and services automobiles. The United Food and Commercial Workers Union, Local 1625 (Petitioner) filed a petition on March 2, 2004, seeking to represent all "production department" (service and parts) employees at the Boynton Beach facility. A hearing in this matter was held on March 16, 2004, in Miami. Briefs were filed by both parties subsequent to the hearing.

The Employer contends that the positions of service administrator, buyer, buyer's assistant, and business office associate share a sufficient community of interest with the employees petitioned-for so as to require their inclusion in the petitioned-for unit. The Petitioner contends that they do not. The parties stipulated that technicians, parts associates, service consultants and inventory associates should be included in the unit.

Based on the evidence and relevant law, I conclude that the service administrator shares a community of interest with the stipulated employees such that he should be included in the same bargaining unit with them. I further find that the employees in the categories of buyers and business office associates do not share a community of interest with the petitioned-for

employees such that they must be included in the same unit. Accordingly I direct an election in a unit of approximately 23 employees.

In the pages that follow, I provide a recital of the background facts relevant to this decision followed by an analysis of the facts and law with respect to each category of employees at issue.

RELEVANT FACTUAL BACKGROUND INCLUDING DESCRIPTION OF THE STIPULATED JOB CLASSIFICATIONS

The Employer operates a chain of establishments that buy, service and sell used cars. As indicated above, the facility in Boynton Beach performs these same functions

The technicians category includes the titles of automotive technicians, senior automotive technicians, and a lead automotive technician. There are approximately six regular, one senior and one lead technician. Their main function is service and repair of vehicles. There was uncontroverted evidence offered by the Employer that all three of these classifications share functions and benefits to an extent which makes it appropriate to discuss them together. The technicians work mainly in the technical bay area. They work Monday to Friday from 8 a.m. to 5:30 p.m. They are supervised by Allen Stearns (satellite operations manager). Stearns in turn reports to the location general manager, Shawn Krugervich. Technicians are paid on a flat rate basis. This flat rate is based on a listing whereby specific prices are assigned to discrete mechanical repairs and services. Thus, a specific task will be charged at a certain fixed rate regardless of the actual time spent on it. Besides their internal training, certain (unspecified) certification(s) are required for technicians.

Parts associates are mainly engaged in acquiring and allocating parts to the technicians or in some cases directly to customers. They work approximately an 8 a.m. to 5 p.m. schedule. They work in a parts department, which is adjacent to the "tech bay". No detailed description of the plant lay-out is in evidence; however, references indicate that the tech bay and parts area

are toward the rear of the facility away from the customer areas. Parts associates are also supervised by satellite operations manager Stearns. They are paid an hourly rate which has not been specified.

There are apparently three service consultants and one senior service consultant. These employees perform a wide range of functions. They document any customer concerns about their vehicles in an electronic repair order system (a computerized guide for the technicians in making repairs). They perform a significant liaison function between customers and technicians or parts associates. They file warranty requests with the Employer's extended warranty carrier. They will often work with customers through the actual payment process, often walking over to the cash window with them.

The service consultants work in an area known as the "service drive" which is easily accessible to customers. They have their own workstations. They are supervised by satellite operations manager Stearns and are paid an hourly wage as well as a commission (not specified). They enjoy a service recognition (awards program), which is administered monthly or quarterly. They usually end work around 6 p.m.

There are approximately nine inventory associates. They work throughout the property and use computers in the tech bay. They work different staggered schedules including overnight schedules. They perform a range of different functions. Their duties include receipt of newly purchased vehicles from transporters. Additionally, they prepare vehicles for sale by placing price stickers on them and moving them out to the front lot for display to customers. They re-merchandize (restock after sales) the front lot. They scan the lot at night (making sure all vehicles are accounted for) and reconcile inventory. They transport vehicles back and forth to local dealers for special repairs that the Employer cannot perform. They pick up invoices and paperwork to bring to the service administrator. They carry bills of lading (BOL) to the business office. Occasionally they drive customers home. They clean the cars and attach license plates.

The inventory associates are paid hourly and are also supervised by satellite operations manager Stearns.

There are no distinctive uniforms for any of the classifications at the Boynton Beach facility. Employees are required to choose between three standard ensembles (for instance between a long sleeve or a polo shirt). All classifications use the same break-room.

SERVICE ADMINISTRATOR TO BE INCLUDED IN THE UNIT

The Employer employs only one service administrator, Betsy Santiago, at its Boynton Beach facility. The service administrator (SA) works near the service consultants but has her own cubicle. However, this is made of glass and the walls only extend five feet up. She is no more than five feet from the consultants.

The SA typically receives and processes warranty claims and submits them to the Employer's warranty company. The SA also receives service related telephone calls throughout the work day. In response to these calls, some contact with the service consultants is required. At times, she schedules appointments for the service consultants. The SA also interacts with customers briefly when they are waiting for a consultant or when she helps the consultant get them a "loaner" car.

The SA may also occasionally work with the service consultants or the automotive technicians in order to resolve discrepancies in allocation of repair time. Similarly, the SA occasionally interacts with parts associates or service consultants when there is a discrepancy in pricing. The SA's schedule is Monday through Friday, 8:00 a.m to 5:00 p.m. This is similar to that of automotive technicians. Some of the inventory associates also keep a similar schedule. When the SA is out, a service consultant will fill in for her.

The SA is supervised by satellite operations manager Stearns who also supervises employees in all the stipulated categories.

The SA is an hourly paid employee and is eligible for the quarterly service recognition program. She clocks in at the same clock as the automotive technicians and the service consultants and is eligible for overtime pay. The SA has the same fringe benefits as inventory associates and service consultants¹.

The Employer argues that the Board policy is to include all employees who perform functions related to repair and service of automobiles in an appropriate unit at an automobile dealership and cites W.R. Shadoff, 154 NLRB 992 (1965), and Austin Ford, 136 NLRB 1398 (1962), in support of this proposition. Notably, in Shadoff, unlike here, the employees in question did “manual work, and many of them [were] expected to show mechanical proficiency and to be able to work with hand tools.” As such, it presents a distinct situation from that of the SA here. In Austin, too, the inclusion of other employees with mechanical employees was predicated on their possession of overlapping mechanical skills and so it, too, presents a different situation from the one at hand. Nonetheless, I find, based on the factual record, that the service administrator does share a community of interest with the stipulated employees. Indeed, her work puts her in contact with the service consultants from whom she is separated only by a short glass wall. She also interacts on occasion with the other stipulated categories. She appears to be very integrated into the process of repair of vehicles at the facility, and she is supervised by the same supervisor as those in the petitioned-for unit. Her inclusion in the unit completes what is essentially a departmental unit under the supervision of the satellite operations manager.²

BUYERS TO BE EXCLUDED FROM THE UNIT

Buyers work throughout the Boynton Beach location. They largely work evenings and weekends (when people come by to sell vehicles). They are supervised by senior buyer Todd

¹ These “fringe benefits” are not described in the record.

² The record reflects no others supervised by the satellite operations manager other than the stipulated categories and the service administrator.

Carlson. They are paid a salary and there is also a bonus program available to them³. Unlike other employees involved herein, they are able to exercise stock options. They are also the only category of employees at issue who are eligible to use “demo cars” (CarMax cars) for their own use. They need no special licensing or certification, nor is previous experience required for hire.

The buyers “source” and manage the inventory, i.e. they obtain and keep track of vehicles. They take custody of new purchases. If the buyer’s assistant is absent, a buyer may park the vehicle in its proper place. They review the front-lot condition and replace buyer’s guides if needed. Similarly they may replace a missing or incorrect price sticker (working with the inventory associates). They may also work with inventory associates in moving cars to re-merchandize the front lot. They also deal with inventory associates when a car needs to be transferred out of the facility for repairs or other reasons. They may work with technicians when doing the appraisal of a new purchase, seeking a technician’s opinion on the nature or extent of a required repair. They similarly sometimes deal with service consultants when questions arise as to the cost of service or repair of a vehicle.

As for temporary interchange, when a buyer is absent from work, another buyer fills in. A buyer fills in for the buyer’s assistant if the buyer’s assistant is absent.

In addition to evaluating vehicles and participating in purchases at the Boynton Beach facility, buyers also go to auctions where vehicles are purchased. They sometimes stay overnight on such trips. The senior buyer, a stipulated supervisor, is apparently involved in most purchase decisions.

³ The Employer claims in its brief that although buyers are salaried, “their compensation in an average pay period is similar to the compensation of an Automotive Technician at Boynton Beach.” The testimony upon which the Employer relies is of little probative value. The Employer’s witness was asked by its attorney, “And how does the compensation of a buyer in an average pay period compare to the total compensation of your automotive technicians in an average pay period?” He replied, “The buyers, some earn less, and some earn more.” No specific dollar figures or ranges were provided to establish the pay of any of the job classifications discussed in this decision.

The Employer argues in the main that buyers are not managerial employees. However, the Board has found buyers to be managerial employees in some cases. For example, in Mack Truck, 116 NLRB No. 222 (1956), the Board excluded buyers from a unit of office clericals as managerial employees based on the following rationale:

The record discloses that the buyers and assistant buyers work under the supervision of either the purchasing agent in charge of factory buyers, or the purchasing agent in charge of service parts buyers. The buyers and assistants receive requisitions which they fill in amounts ranging from \$800,000 to \$6,000,000. They have authority to negotiate prices, change delivery dates, and adjust disputes with suppliers over rejected items. We find that the buyers and assistant buyers are managerial employees and shall exclude them.

The same result was reached in Western Gear Corporation, 160 NLRB 272 (1966), where buyers and buyer trainees were excluded from the unit due to similar managerial employee attributes. See also, Bell Aerospace, 219 NLRB 384 (1975).

At the hearing in the instant case, the parties do not appear to have focused on the managerial issue. Thus, the nature and extent of the buyers' authority to independently purchase vehicles or pledge the Employer's credit was not fully explored. However, I need not reach that issue here. Based on the record, even if they are not managerial employees, buyers do not share a sufficient community of interests with the petitioned-for employees and the service administrator to require their inclusion in the unit. In this regard, buyers' job duties differ greatly from those in the petitioned-for unit and do not relate directly to service and repair of vehicles. Buyers are supervised by the senior buyer, not the satellite operations manager. They are salaried and are eligible for stock options and "demo" cars. They attend auctions at locations away from the Boynton Beach facility. While there may be some minor overlap of duties, no one but another buyer fills in if a buyer is absent, and the only evidence of buyers filling in for others is that they fill in for the buyer's assistant. Likewise, there is no evidence that any employees from any other category at issue has permanently transferred to a buyer position. Accordingly, I shall exclude buyers from the unit.

BUYER'S ASSISTANT

There is only one buyer's assistant at the Boynton Beach location at this time. He works throughout the facility and works evenings and some weekends, "as needed". He is paid hourly and punches the time-clock. He receives the same benefits as regular part-time inventory associates⁴. He is supervised by Todd Carlson, the senior buyer. No special certifications or training is required for this position.

The duties of the buyer's assistant call for him to take custody of new vehicles, parking them in the proper area up front, putting on price stickers, checking if the buyer's guide is showing, and helping to remerchandize. This may bring him in contact with inventory associates who may perform some similar functions. The Employer provided testimony that only a buyer's assistant or buyer (and not an inventory associate) may fill out a "secure form." This involves taking the actual odometer reading and writing up the vehicle to actually take custody from the seller. As noted above, if the buyer's assistant is absent, a buyer fills in for him.⁵

Petitioner contends that the buyer's assistant is involved with moving cars for buyers and sales associates and is in no way involved with repair and service. The Employer relies on the same cases cited earlier. The Employer argues that the buyer's assistant works closely with inventory associates and that he enjoys the same benefits, roughly the same total compensation and works a similar schedule to some inventory associates. Based on the record, I am unable to resolve the issue of whether or not the buyer's assistant should be included in the petitioned-for unit. The facts that he is supervised by the senior buyer and that

⁴ As noted above, the nature of these "benefits" and specific wage rates are not included in the record.

⁵ General testimony was provided by the Employer's regional vice president that the buyer's assistant is "constantly" in contact with inventory associates and that he spends greater than 50% of his time dealing with "inventory, parts and technicians". However, no evidentiary foundation for this testimony was provided showing that this witness works at or visits this location on a regular basis, or works there or visits at night and on weekends when the buyer's assistant is at work.

buyers fill in for him in his absence tend to demonstrate that he should be included in a unit with buyers. The buyers, as noted above, do not share a community of interests with those supervised by the satellite operations manager so as to require their inclusion in the petitioned-for unit.⁶ Furthermore, the buyer's assistant may have a stronger community of interests with yet other employees at this facility,⁷ than with those supervised by the satellite operations manager. Accordingly, I shall allow the buyer's assistant to vote by challenge, should he choose to vote.⁸

BUSINESS OFFICE ASSOCIATES TO BE EXCLUDED FROM UNIT

The lead business office associates (BOAs) work in the business office, which is adjacent to the service drive. Their work area is near that of the service consultants. There is apparently a large window with a counter between the consultant area and the business office area. This counter can accommodate two BOAs (interacting with two consultants) simultaneously quite comfortably and perhaps three with some crowding. It is an L or U shaped area with some work-stations. This work area is secured with two locked entrances to protect cash as well as confidential documents.

BOAs work staggered shifts, including some evening work. At least one is present to open around 7:30 a.m. and a couple are present at closing. Closing is officially 9 p.m. but in order to complete sales and other unfinished work they may stay until 10 or 11 p.m. Two to four BOAs are at work at any given time during the day. They are supervised by Brian Stiles, the business office manager and a stipulated supervisor. He in turn reports to Shawn Krugervich, the location general manager. BOAs are paid hourly whether they are part-time or full-time and punch the time clock. BOAs receive the same benefits as stipulated category

⁶ I note that the buyers may be managerial employees, an issue not fully litigated.

⁷ At the hearing, the Employer noted that it also employs sales employees, customer assistance representatives, management assistants and an assistant business office manager at this location. These classifications were for the most part mentioned only in passing at the hearing. And, of course, the Employer also employs the business office associates, who are discussed further below.

⁸ I also note that whether or not the buyer's assistant is an "on-call" employee is somewhat unclear from the record.

employees. Apparently, unlike the employees supervised by the satellite operations manager, they are assigned secure lockers located in a common hallway, although other employees may apparently request lockers as well.

BOAs do a number of different things at work. They are the ones who receive cash or payments. They accept all the “receiving” papers for vehicle purchases and make a “jacket” with extra keys, etc. They put together the bills of lading for the cars being transported in or out.

After 6 p.m., the BOAs may need to perform duties otherwise performed by service consultants or others. Thus, in the evening, they may explain a service order/bill to a customer and may even turn the keys over to the customer and give delivery.

They do interact with other employees, including those in the other stipulated categories. The Employer claims this occurs during more than 50% of their working time.⁹ Inventory associates or the buyer’s assistant will talk to the BOAs to get title and other documents. During the preparation and delivery process, the BOA will call the inventory associates and relay progress reports to the customer. The Employer argues that they must interact in this way a great deal since every month hundreds of vehicles are purchased and/or shipped out. The BOAs apparently have little or no hand in clerical work that relates to financing or personnel. Financing is handled by the sales associates. Payroll, time-cards and employee files are handled by the manager’s assistant. On the other hand, BOAs clearly spend a significant portion of their time working with sales associates on paperwork that goes with selling the Employer’s cars to customers. As such, they are doing work that is distinct from the service of vehicles and related parts functions. Also, they report to the business office manager, not the satellite operations manager.

⁹ As noted above with respect to the buyer’s assistant, the foundation for this testimony is lacking in the record.

If a BOA is absent, the assistant business officer manager¹⁰ or another BOA will fill in for her. While there is evidence of some overlap of duties (described above), there is otherwise no evidence of temporary or permanent interchange between BOAs and others. The assistant business office manager is also apparently directly supervised by the business office manager, because the record reflects that he prepares her performance appraisal, as well as those of the BOAs.

The Employer argues that the BOAs are plant, not office, clerical employees. The resolution of the question of which of these labels may appropriately apply is not always readily apparent, particularly in a setting other than a manufacturing plant. In the present case, the BOAs work in the “business office,” albeit a business office that is adjacent to the work area of certain unit employees. They are supervised by the business office manager, and the “assistant business office manager” substitutes for them in their absence.¹¹ They handle cash and have access to financial information. In the circumstances of this case, the BOAs appear to be office clericals, who share either a separate community of interests, or a community of interests with the assistant business office manager (or manager’s assistant).¹² Accordingly, I shall exclude the BOAs from the unit.¹³

CONCLUSIONS AND FINDINGS

Based upon the entire record in this proceeding, and in accordance with the foregoing discussion, I conclude and find the following:

1. The hearing officer’s rulings made at the hearing are free from prejudicial error and are hereby affirmed.

¹⁰ It is not clear from the record whether the “assistant business officer manager” is the same person as the “manager’s assistant.” As noted earlier, there is only passing reference in the transcript to these positions.

¹¹ The record does not reflect who substitutes for the assistant business office manager in her absence.

¹² Nothing in the record suggests that this job classification is supervisory.

¹³ Even if I were to find the BOAs to be plant clericals, their interests appear to be more closely aligned to those of sales employees, rather than to those of service and parts employees.

2. CarMax, the Employer, is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.¹⁴

3. The Petitioner, a labor organization, seeks to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of §9(c)(1) and §2(6) and (7) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of §9(b) of the Act:

All full-time and regular part-time automotive technicians, senior automotive technicians, lead automotive technicians, service consultants, senior service consultants, service administrator, inventory associates, and parts associates employed by the Employer at its facility at Boynton Beach, Florida; excluding buyers, business office associates, guards and supervisors as defined in the Act.¹⁵

ORDER DIRECTING ELECTION

The National Labor Relations Board shall conduct a secret ballot election among employees in the unit found appropriate above. The employees will vote on the question of whether or not they wish to be represented by the United Food and Commercial Workers Union, Local 1625, for the purposes of collective bargaining. The date, time and place of the election will be specified in the notice of election that the Regional Office will issue subsequent to this decision.

¹⁴ At the hearing, the parties stipulated that CarMax is an Employer engaged in commerce within the meaning of the Act. CarMax is incorporated in Delaware and in the past year derived gross revenues from its dealership in excess of \$500,000 and received goods valued in excess of \$50,000, which were purchased outside the State of Florida and received directly at its Boynton Beach, Florida, facility, from points located outside the State of Florida.

¹⁵ As noted above, the buyer's assistant shall be permitted to vote subject to challenge.

A. Voter Eligibility

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation or temporarily laid off. Also eligible are employees engaged in any economic strike who have retained their status as strikers and have not been permanently replaced. In addition, in an economic strike that began less than 12 months before the election date, employees engaged in such a strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

B. Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. Excelsior Underwear, Inc., 156 NLRB 1236 (1986); NLRB v. Wyman-Gordon Company, 394 U.S. 759 (1969).

Accordingly it is hereby directed that within seven days of this Decision, the Employer must submit to the Regional Office, an election eligibility list, containing the full names and addresses of all the eligible voters. North Macon Health Care Facility, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both

preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in the Regional Office, 201 East Kennedy Boulevard, Suite 530, Tampa, Florida 33602-5824, on or before April 23, 2004. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. If you have any questions, please contact the Regional Office.

C. Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices of Election provided by the Board in areas conspicuously visible to potential voters for a minimum of three full working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least five full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. Club Demonstration Services, 317 NLRB 349 (1995). An employer who fails to do so may not file objections based on the non-posting of the election notice.

Right to Request Review

Under the provisions of §102.67 of the Board's Rules and Regulations, a request for review of this decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W. Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5 p.m., EST, on April 30, 2004. This request may not be filed by facsimile.

DATED at Tampa, Florida, this 16th day of April 2004.

/s/ [Rochelle Kentov]

Rochelle Kentov, Regional Director
National Labor Relations Board, Region 12
201 E. Kennedy Boulevard, Suite 530
Tampa, FL 33602